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84-1738

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1984

SACKETT-CHICAGO, INC.,
Petitioner,

vs.

TERRY MIDGETT,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The first question presented for review is whether Sackett-Chicago, Inc. waived its right to argue that Terry Midgett's cause of action for retaliatory discharge was pre-empted by Section 301 of the Labor Management Relations Act.

II. The second question presented for review is whether Section 301 of the Labor Management Relations Act barred Terry Midgett, an employee subject to a collective bargaining agreement which proscribed his discharge for other than just cause and provided for an exclusive three-step grievance procedure, from maintaining an action for retaliatory discharge against his employer, Sackett-Chicago, Inc., without first adhering to the grievance procedures provided for in the collective bargaining agreement.

III. The third question presented for review is whether the National Labor Relations Board had exclusive primary jurisdiction over Terry Midgett's claim for retaliatory discharge, thereby depriving the courts of the State of Illinois of subject matter jurisdiction.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
Opinions Below	1
Jurisdiction	2
Statute Invoked	2
Statement Of The Case	2
A. The Facts	2
B. The Illinois Appellate Court Decision	6
C. The Illinois Supreme Court Decision	6
1. The Majority Opinion	6
2. The Dissenting Opinion	7
3. The Petition for Rehearing and the Amended Majority Opinion	7
4. Finality of Decision	8
I. SACKETT-CHICAGO, INC. DID NOT WAIVE ITS RIGHT TO ARGUE BEFORE THIS COURT THAT TERRY MIDGETT'S CAUSE OF ACTION FOR RETALIATORY DISCHARGE WAS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.	9
II. THE ILLINOIS SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH THE FEDERAL LABOR LAW AND POLICY EXPRESSED IN SECTION 301 AND THE DECISIONS OF THIS COURT.	12

PAGE

III. THE NATIONAL LABOR RELATIONS BOARD HAD EXCLUSIVE PRIMARY JURISDICTION OVER TERRY MIDGETT'S CLAIM FOR RETALIATORY DISCHARGE, THEREBY DEPRIVING THE COURTS OF THE STATE OF ILLINOIS OF SUBJECT MATTER JURISDICTION. 16

IV. THIS CASE PRESENTS IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS. 20

TABLE OF AUTHORITIES

CASES

PAGE

Allis-Chalmers Corp. v. *Lueck,* No. 83-1748 (United States Supreme Court filed April 16, 1985) 12, 14-15, 18-19

Bell v. *Union Carbide Corp.,* 582 F. Supp. 824 (E.D. Tenn. 1984) 16-18

Cronin v. *Lindberg,* 66 Ill. 2d 47, 4 Ill. Dec. 424, 360 N.E.2d 360 (1977) 10

Doran v. *Cullterton,* 51 Ill. 2d 553, 283 N.E.2d 865 (1972) 11

Farmer v. *Carpenters,* 430 U.S. 290, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977) 17-20

Gateway Coal Co. v. *United Mine Workers of America,* 414 U.S. 368, 38 L. Ed. 2d 583, 94 S. Ct. 629 (1974) .. 13

Gatto v. *Walgreen Drug Co.,* 61 Ill. 2d 513, 337 N.E. 2d 23 (1975), *cert. denied,* 425 U.S. 936, 48 L. Ed. 2d 178, 96 S. Ct. 1669 (1976) 11

Hathorn v. *Lovorn,* 457 U.S. 255, 72 L. Ed. 2d 824, 102 S. Ct. 2421 (1982) 12

Hines v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (1976) 13

PAGE

Hux v. *Raben*, 38 Ill. 2d 223, 230 N.E.2d 831 (1967) .. 11

In Interest of N.W., 125 Ill. App. 3d 367, 80 Ill. Dec. 644, 465 N.E.2d 990 (1984) 11

Midgett v. *Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 85 Ill. Dec. 475, 473 N.E.2d 1280 (1984) 1, 12, 14, 16, 19-21

Midgett v. *Sackett-Chicago, Inc.*, 118 Ill. App. 3d 7, 73 Ill. Dec. 843, 454 N.E.2d 1092 (1983) 1

New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63, 73 L. Ed. 184, 49 S. Ct. 61 (1928) 9

Palmateer v. *International Harvester Co.*, 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876 (1981) 5

People ex rel. Fahner v. *Hedrich*, 108 Ill. App. 3d 83, 63 Ill. Dec. 782, 438 N.E.2d 924 (1982) 11

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 64 L. Ed.. 2d 741, 100 S. Ct. 2035 (1980) 9

Republic Steel Corp. v. *Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965) 7, 10, 13, 21

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959) 7, 8, 16-19

Schatz v. *Abbott Laboratories*, 51 Ill. 2d 143, 281 N.E.2d 323 (1972) 11

Street v. *New York*, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) 9

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960) 10, 12-14

Vaca v. *Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967) 10

Wadlington v. *Mindes*, 45 Ill. 2d 447, 259 N.E.2d 257, *appeal dismissed*, 400 U.S. 935, 27 L. Ed. 2d 242, 91 S. Ct. 252 (1970) 11

PAGE

Webb v. *Webb*, 451 U.S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981) 9-10

Viestenz v. *Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972, 74 L. Ed. 2d 284, 103 S. Ct. 303 (1982) 16, 19

Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Union Local No. 29, 256 N.L.R.B. 1145 (1981) 17

Wozniak v. *Segal*, 56 Ill. 2d 457, 308 N.E.2d 611 (1974) 11

STATUTES

28 U.S.C. § 1257(3) 2, 10

Labor Management Relations Act, Section 301, 61 Stat. 156, 29 U.S.C. § 185 ..... 2, 9-10, 13

28 U.S.C. § 1257(2) 9

Ill. Rev. Stat. ch. 110A, ¶ 366 11

National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 12-13

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois entered in this case on October 19, 1984, as amended February 1, 1985.

OPINIONS BELOW

This Petition seeks review of a divided decision of the Supreme Court of the State of Illinois reported at 105 Ill. 2d 143, 473 N.E.2d 1280 (1984). It appears in Appendix, *infra* (App. 1a-12a). The opinion of the Illinois Appellate Court is reported at 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1983). It appears in Appendix, *infra* (App. 13a-17a).

The opinions of the Illinois Circuit Court of Cook County are unpublished. They appear in Appendix, *infra* (App. 18a-30a).

Petitioner, Sackett-Chicago, Inc., has no parent, affiliated, or subsidiary corporations.

JURISDICTION

The judgment of the Supreme Court of the State of Illinois, which judgment the Petitioner herein seeks to be reviewed, was entered on October 19, 1984. Rehearing was denied on February 1, 1985, at which time an amended opinion was filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOKED

Section 301 of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. § 185) provides in pertinent part as follows:

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

A. THE FACTS

On December 31, 1980, Respondent, Terry Midgett (hereinafter "Midgett"), his wife, and their four minor children filed a complaint for retaliatory discharge against Petitioner, Sackett-Chicago, Inc. (hereinafter "Sackett") and David J. Schimp, as officer, employee

and agent of Sackett. (R. 2-6). Summons was placed and while Sackett was served with summons, Schimp was not. (R. 8-11).

Sackett filed an appearance (R. 12) and a motion to dismiss. (R. 25-29). The motion to dismiss alleged the existence of a collective bargaining agreement and asserted that federal law required Midgett to utilize the grievance procedures contained therein. (R. 28-29). The motion thereafter alleged that Midgett did not follow those procedures and the complaint should be dismissed. (R. 29). Thereafter, Midgett and the other plaintiffs filed a document styled "Combined Motion to Strike and Conditional Response of Plaintiffs to Defendants Motion." (R. 31-36). On March 13, 1981, the trial court denied Sackett's motion to dismiss and granted Sackett leave to file a new motion to dismiss with affidavits within twenty-eight days. (App. 32a).

On April 19, 1981, Sackett filed its second motion to dismiss, alleging that the same theories of federal law governed. (R. 15-24). Sackett also filed the affidavit of Edward Alexander, president of Sackett (R. 37-65), and the affidavit of Anthony Pinelli, counsel for the Production Workers Union of Chicago and Vicinity, Local 707 (hereinafter "Local 707"). (R. 66-71).

Alexander's affidavit stated that he was the president of Sackett, was familiar with a collective bargaining agreement between Sackett and Local 707, that the agreement was in effect at the time of Midgett's discharge, that Midgett was not in a supervisory capacity, and that he was familiar with Midgett's employment record. (R. 37-38). Attached to Alexander's affidavit was a copy of the agreement between Sackett and Local 707. (R. 39-64).

Article 3, paragraph 2 of the agreement stated:

> 2. *Suspension, Discharge or Demotion.* It is agreed, however, that no regular employee employed by Employer for ninety (90) days or more shall be dismissed . . . without just and sufficient cause; therefore, if any employee is proved to have been discharged . . . unjustly or without cause . . ., such employee shall be restored to his position with compensation for all time lost provided that formal protest in writing is made and delivered to Employer within one week from such alleged unjust discharge . . . . Such case shall be governed by the provisions with respect to grievances set forth in this Agreement. (R. 46).

Additionally, Article 7 of the agreement provided for a three-step grievance and arbitration procedure. (R. 54-57). The affidavit had attached as an exhibit a dues and initiation check-off card, signed by Midgett, which stated that it was executed "in compliance with the provisions of the Labor-Management Relations Act of 1947." (R. 65).

The Affidavit of Anthony Pinelli stated that he was counsel for Local 707, had reviewed Midgett's employment records, and that Local 707 was in possession of a dues remittance card, two grievance forms previously filed by Midgett, and an envelope containing a request for a Withdrawal Card addressed to Midgett which was returned as being undeliverable. (R. 66). Copies of the foregoing documents were attached to the affidavit. (R. 67-71).

Midgett filed a motion for an extension of time to file responses, answers, objections, and affidavits. (R. 72-73). A document styled "Combined Motion to Strike and Conditional Response of Plaintiffs with Supporting

Affidavits" was filed by Midgett and the other plaintiffs. (R. 78-95).

On July 6, 1981, the trial court entered an order continuing the hearing to give consideration to the then recent Illinois Supreme Court decision in *Palmateer* v. *International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). Further, the court struck Midgett's affidavit, granted Midgett leave to refile an affidavit within 21 days, and denied Midgett's motion to strike Sackett's affidavits.

Midgett filed a new affidavit on August 20, 1981, one day before a scheduled hearing on Sackett's motion to dismiss. (R. 96, 117). After a hearing on August 28, 1981, the court entered an order on September 1, 1981, striking the counter-affidavit and dismissing the complaint with prejudice. (R. 120) (App. 20a). The court found no question of fact remaining for resolution. (R. 121-122) (App. 18a).

Midgett filed a motion to vacate the court's order in which they contended that the court had erred in striking the counter-affidavit of Midgett and denying their motion to strike Sackett's Affidavit and motion. (R. 131-136). In addition, Midgett and the other plaintiffs attempted to file an amended complaint in the name of Midgett, his wife, and minor children merely restating the original cause of action pleaded and adding allegations that Sackett refused, hampered, and prevented Midgett from pursuing the grievance procedures under the collective bargaining agreement in breach of that agreement. (R. 123-130).

Sackett filed objections to the motion to vacate and moved to strike the amended complaint on the grounds

that leave to file had not been granted and no new cause of action had been pleaded. (R. 139). After taking the matter under advisement, the court denied Midgett's motions to vacate and for leave to file an amended complaint on November 16, 1981. (R. 148). The court's memorandum opinion noted that no cause of action could be stated in favor of Midgett's wife and minor children and that no allegation or affirmative matter had been stated to rebut Sackett's evidence that Midgett was subject to the collective bargaining agreement. (R. 149-150) (App. 27a-28a). Consequently, no cause of action was recognized under Illinois law. Leave to file the amended complaint was denied on the grounds that it improperly named parties who already had been determined to have no cause of action against Sackett. (R. 149-150) (App. 27a-28a). A notice of appeal was thereafter filed on the basis of the court's November 16, 1981 order. (R. 154).

B. THE ILLINOIS APPELLATE COURT DECISION

On September 21, 1983, the Illinois Appellate Court reversed the trial court in part and held that the existence of the collective bargaining agreement did not bar Midgett's cause of action. (App. 13a-17a). The court further held that such a determination did not conflict with federal labor law policy. (App. 15a-16a). The court affirmed the trial court, in part, holding that no cause of action was stated on behalf of Midgett's wife and minor children. (App. 17a).

C. THE ILLINOIS SUPREME COURT DECISION

1. The Majority Opinion

On October 19, 1984, the four justice majority of the Illinois Supreme Court held that the tort of retaliatory

discharge which had previously been extended to "at-will" employees exclusively, would be extended to union employees "independent of any contract remedy the employee may have based on the collective bargaining agreement." (App. 5a). The court also ruled that its decision would not be "violative of Federal labor-law policy for industrial stability through the use of arbitration in union agreements." (App. 6a). The Illinois Supreme Court further noted that this Court had allowed employees to bring claims based on federal statutes without exhausting grievance procedures. (App. 7a).

2. The Dissenting Opinion

The three dissenting justices rejected this analysis. They first noted that the respondent was covered by a collective bargaining agreement, but had failed to utilize the grievance procedures contained therein. (App. 9a). Further, the dissenting justices stated that this Court's opinion in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), mandated that Midgett's failure to utilize his grievance procedures barred his action against Sackett. (App. 11a).

3. The Petition for Rehearing and the Amended Majority Opinion

Sackett filed a petition for rehearing alleging that, in accordance with this Court's decision in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), the state trial court was without subject matter jurisdiction to adjudicate Midgett's complaint. (App. 38a-43a).

On February 1, 1985, the Illinois Supreme Court denied Sackett's petition for rehearing. (App. 44a). On the

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same date, an amended opinion was issued. The amendment consisted of a one paragraph insertion citing cases from other jurisdictions which had reached similar results. (App. 47a). Three of the cited cases had applied the *Garmon* decision and held that the state courts involved were not deprived of subject matter jurisdiction.

4. Finality of Decision

The Illinois Supreme Court's decision on the issues of federal labor policy is the law of this case and is final within the meaning of 28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

I.

SACKETT-CHICAGO, INC. DID NOT WAIVE ITS RIGHT TO ARGUE BEFORE THIS COURT THAT TERRY MIDGETT'S CAUSE OF ACTION FOR RETALIATORY DISCHARGE WAS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

In rendering its amended opinion in this cause, the Illinois Supreme Court granted Midgett's motion to strike a portion of Sackett's brief relating to the issue of federal pre-emption derived from case law interpreting 29 U.S.C. § 185(a) (App. 8a). Thus, the first federal question presented is whether Sackett has waived this issue for purposes of review by this Court. In making this determination, this Court is not bound by the Illinois Supreme Court ruling on the issue. *Street* v. *New York*, 394 U.S. 576, 583 (1969).

This Court can examine the final judgment of a state court only if the record, as a whole, shows either expressly or by clear implication that the federal claim was adequately presented in the state courts. *Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981). Further, "[n]o particular form of words or phrases is essential, but only that the claim . . . be brought to the attention of the state court with fair precision and in due time." *Pruneyard Shopping Center* v. *Robins*, 457 U.S. 74, 85 n.9 (1980), quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). While *Zimmerman* and *Robins* related to this Court's jurisdiction under 28 U.S.C. § 1257(2), the func-

tion of the rule is equally applicable to federal questions under 28 U.S.C. § 1257(3).

In *Webb*, this court found that the petitioner failed to raise her federal claim in the state court. 451 U.S. 493 (1981). The petitioner in *Webb* failed to specify what federal right was claimed and neither the state court majority nor minority ruled on any federal question. *Id.* The instant case is completely different. In the trial court Sackett made specific reference in its motion to dismiss to the cases of *Vaca* v. *Sipes*, 386 U.S. 171 (1967), *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960), and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1964). (R. 15-30). Further, both the Illinois Appellate Court and the Illinois Supreme Court ruled that federal labor law policy was not inconsistent with the decisions rendered. (App. 6a-7a, 15a-16a). The dissent in the Illinois Supreme Court specifically based its opinion on the cases cited by Sackett in the trial court. (App. 9a-12a). Although 28 U.S.C. §185(a) was not specifically cited by Sackett in its motions in the trial court to dismiss the complaint, each federal case cited related to that section. Further, the federal cases were specifically cited for the proposition that Midgett was obligated to pursue the grievance procedures provided for in the collective bargaining agreement. Therefore, Sackett properly preserved the federal questions sought to be reviewed here.

In Illinois, an issue is generally deemed waived if not presented in the trial court. *Cronin* v. *Lindberg*, 66 Ill. 2d 47, 61, 360 N.E.2d 360, 366 (1977). However, the Illinois courts consider and decide issues deemed to be "waived" where all facts necessary to a determination are of record, the case is one of great public importance

and the issues have been briefed. *Id. See also, e.g., Gatto* v. *Walgreen Drug Co.*, 61 Ill. 2d 513, 337 N.E.2d 23 (1975), *cert. denied*, 425 U.S. 936 (1976); *Wozniak* v. *Segal*, 56 Ill. 2d 457, 308 N.E.2d 611 1974); *Doran* v. *Cullterton*, 51 Ill. 2d 553, 283 N.E.2d 865 (1972); *Schatz* v. *Abbott Laboratories*, 51 Ill. 2d 143, 281 N.E.2d 323 (1972); *Wadlington* v. *Mindes*, 45 Ill. 2d 447, 259 N.E.2d 257, *appeal dismissed*, 400 U.S. 935 (1970); *Hux* v. *Raben*, 38 Ill. 2d 223, 230 N.E.2d 831 1967); *In Interest of N.W.*, 125 Ill. App. 3d 367, 465 N.E.2d 990 (1984); *People ex rel. Fahner* v. *Hedrich*, 108 Ill. App. 3d 83, 438 N.E.2d 924 (1982). In each of these cases, the Court ruled on state statutory construction, but in the present case chose not to rule on federal statutory construction although all facts necessary to a determination were of record, the case was one of great public importance, and the issues were briefed. Furthermore, the authority to rule on "waived" issues is found in Illinois Supreme Court Rule 366. Ill. Rev. Stat. ch. 110A, ¶ 366 (1983).

The Illinois Supreme Court erroneously applied Rule 366. The record in this case is filled with Sackett's repeated references to the requirement under federal law that a union employee exhaust contractual grievance procedures. (App. 22a-26a, 33a-37a). Certainly, the potential erosion of the collective bargaining process is a matter of great public importance. In addition, Sackett's arguments were fully briefed before the Illinois Supreme Court by both parties, yet the Court struck Sackett's federal preemption argument merely because no specific reference was made in the trial court to Section 301 of the Labor Management Relations Act. Such a ruling is not an adequate basis to bar this Court's review. When a state rule

concerning waiver is not strictly or regularly followed, such a rule is not deemed adequate to bar review. *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-263 (1982).

Illinois Supreme Court Rule 366 is not strictly or regularly followed in this case; therefore, all issues contained in this petition are properly before this Court.

II.

THE ILLINOIS SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH THE FEDERAL LABOR LAW AND POLICY EXPRESSED IN SECTION 301 AND THE DECISIONS OF THIS COURT.

The case at bar is *Allis-Chalmers Corp* v. *Lueck* revisited. No. 83-1748 (U.S. Sup. Ct. filed April 16, 1985). In *Allis-Chalmers*, this Court recently held that an employee cannot bypass collective bargaining agreement grievance procedures by bringing an independent lawsuit, purportedly sounding in tort, against the employer. *Id.* The Illinois Supreme Court's decision in *Midgett* v. *Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (App. 1a-12a), is inconsistent with the more recent *Allis-Chalmers* decision and a myriad of past United States Supreme Court decisions.

In furtherance of the powers granted to it by the Commerce Clause, Congress constitutionally enacted the Labor Management Relations Act of 1947 (hereinafter "LMRA"). *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Good faith negotiation between employers and unions and the administration of collective bargaining agreements are central to and encouraged by the LMRA. 29 U.S.C. § 151 (1982).

Section 301 of the LMRA states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ." 29 U.S.C. § 185(a).

On several occasions, this Court has asserted the importance of the collective bargaining process and the labor contract which emerges from it. For example, the collective bargaining agreement has been described by this Court as "the best means of avoiding industrial strife." *Gateway Coal Co.* v. *United Mine Workers of America,* 414 U.S. 368, 378 (1974). In *United Steelworkers,* this Court stated that:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant.

363 U.S. 574, 578-79 (1960).

Based upon these principles, this Court has long held that an employee must attempt to utilize the grievance procedures provided in the collective bargaining agreement before seeking redress in the courts under other theories of liability. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965). Any other rule would create a disruptive influence on the collective bargaining process and the overall federal labor policy espoused by Congress and the United States Supreme Court. *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 570-71 (1976). More

specifically, a contrary result would fail to preserve the key role which arbitration assumes in our "system of industrial self-government." *Allis-Chalmers Corp.* v. *Lueck,* No. 83-1748, slip op. at 17 (U.S. Sup. Ct. filed April 16, 1985), citing *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). The Illinois Supreme Court's decision in *Midgett* reaches such a contrary result.

In *Midgett,* the employee was a member of a collective bargaining unit which was represented by the Production Workers Union of Chicago and Vicinity, Local 707 ("Local 707"). (R. 37-71). A valid collective bargaining agreement had been executed by Local 707 and Sackett, the employee herein was subject to its terms, and the agreement was in full effect at the time of the employee's alleged wrongful discharge. (R. 37-38).

Article 3, Section 3 of the contract governed discharge of employees. That section provided that "no regular employee employed by the Employer for ninety (90) days or more shall be dismissed, laid off, suspended or demoted without just and sufficient cause. . . ." (R. 45). Article 7 of the contract provided for an exclusive three-step grievance and arbitration procedure. (R. 54-57).

The Illinois Supreme Court held that a union employee who is subject to a collective bargaining agreement could bypass the grievance procedures provided in the agreement and directly pursue an action in the state courts under a common law tort theory. *Midgett,* 105 Ill. 2d at 150, 473 N.E.2d at 1283-84. This Court's decision in *Allis-Chalmers* condemns such a practice. *Allis-Chalmers,* No. 83-1748 (U. S. Sup. Ct. filed April 16, 1985).

In *Allis-Chalmers,* a collective bargaining agreement incorporated a separately negotiated health and disability insurance plan. Slip op. at 1. The agreement also provided for a four-step grievance procedure that could ultimately end in binding arbitration. *Id.* at 2. The employee involved therein was subject to the agreement and brought an action against the employer and insurance carrier for the tort of bad faith handling of an insurance claim. *Id.* at 3.

The Wisconsin Supreme Court ruled that the tort action was independent from any claim that could be brought for breach of the collective bargaining agreement. *Id.* at 4. The court reasoned that the administration of disability claims was only of peripheral concern to Congress, but was of substantial significance in the State of Wisconsin. *Id.* at 5. Therefore, the court held that the action was not barred by federal labor policy. *Id.* This Court rejected that theory. *Allis-Chalmers* v. *Lueck,* No. 83-1748 (U. S. Sup. Ct. filed April 16, 1985).

This Court initially stated that where the state-law rights sought to be enforced are "inextricably intertwined with consideration of the terms of the labor contract", the state tort law cause of action is pre-empted. *Id.* at 11. Further, this Court noted that the state tort claim, of necessity, was based on an insurance contract and, therefore, any attempt to assess liability for a breach would involve a contract interpretation. *Id.* at 15. Finally, this Court determined that had the employee brought an action based on a breach of the contract rather than on a tort theory of liability, he would have been required to submit the same claim to arbitration as that which he sought to have adjudicated in the state courts. *Id.* at 17.

This Court asserted that such a result was the "most harmful aspect of the Wisconsin decision" in that it allowed an individual to sidestep available grievance procedures. *Id.* Included in the types of grievances which are to be brought pursuant to contract terms rather than state tort causes of action are those for "unfair discharge." *Id.*

Additionally, it is important to note that the decision rendered herein is inconsistent with the decision of the Tenth Circuit Court of Appeals. In *Viestenz* v. *Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982), the court held that Section 301 does not permit an action for wrongful discharge in the state courts because such a claim relates to the administration and enforcement of employee rights under the collective bargaining agreement. The case of *Bell* v. *Union Carbide Corp.*, 582 F. Supp. 824 (E.D. Tenn. 1984), supports the same proposition.

III.

THE NATIONAL LABOR RELATIONS BOARD HAD EXCLUSIVE PRIMARY JURISDICTION OVER TERRY MIDGETT'S CLAIM FOR RETALIATORY DISCHARGE, THEREBY DEPRIVING THE COURTS OF THE STATE OF ILLINOIS OF SUBJECT MATTER JURISDICTION.

The Illinois Supreme Court's decision in *Midgett* should be reversed because the court was without subject matter jurisdiction to adjudicate this action. In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), this Court held that when questioned activity is "arguably" subject to Sections 7 or 8 of the Labor Management Relations Act, this inquiry need not be made because both the federal and state courts must defer to

the exclusive jurisdiction of the NLRB in such cases. *Id.* at 245. This Court reasoned that state courts exercise power over an activity and that exercise of power threatens interference with a clearly mandated policy of industrial relations, the state courts are precluded from acting. *Id.* at 243. Two exceptions to this rule were announced. The first exception is when the questioned activity is "a merely peripheral concern of the Labor Management Relations Act." *Id.* The second exception is when the state interests to be protected are "so deeply rooted in local feeling" that no inference can be made that Congress intended to deprive the states of the power to act. *Id.* at 244.

Causes of actions sounding in tort for retaliatory discharge are more than a "peripheral concern" of the LMRA. The National Labor Relations Board has determined that retaliatory discharge is an unfair labor practice and thus directly in the heart of what Congress intended to hold sway over. *Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Union Local No. 29,* 256 N.L.R.B. 1145 (1981). *See, also, Viestenz* v. *Fleming Companies, Inc.,* 681 F.2d 699 (10th Cir. 1982), *cert. denied,* 459 U. S. 972; *Bell* v. *Union Carbide Corp.,* 582 F. Supp. 824 (E.D. Tenn. 1984).

This Court had an opportunity to clarify the proper application of the *Garmon* rule and the second exception in *Farmer* v. *Carpenters,* 430 U.S. 290 (1977). In *Farmer,* the plaintiff brought a tort action against his union for intentional infliction of emotional distress. *Id.* This Court, in applying the *Garmon* balancing test, found that "the state-court tort action [could] be adjudicated without regard to the merits of the underlying labor controversy." *Id.* at 300. Based upon this, the

tort action for intentional infliction of emotional distress was maintainable in state court.

The danger of the *Farmer* opinion being excessively employed to justify state-law tort actions did not go unnoticed. In *Farmer,* the Court made clear that the allowance of state court jurisdiction would not apply in all state tort actions. This Court stated that state court jurisdiction would not be permitted when a "threat of interference with the federal regulatory scheme" would occur. *Id.* at 305. Before a state court has jurisdiction to adjudicate a tort claim made by an employee subject to a collective bargaining agreement, "it is essential that the state tort be either *unrelated to employment discrimination* or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Id.* (emphasis supplied). In the present case, the tort of retaliatory discharge can only occur in the presence of an employment relationship. Thus, retaliatory discharge cannot be deemed "so deeply rooted in local feeling" to avoid the *Garmon* rule.

In *Allis-Chalmers,* this Court noted that the *Garmon* rule did not apply to the facts before it. Slip op. at 11 n.9. *Allis-Chalmers* involved a situation which, aside from being preempted under § 301, contained no potential for being arguably subject to Sections 7 or 8 of the Labor Management Relations Act. In contrast, the case at bar involves a claim for wrongful discharge made by a union employee who was protected by a collective bargaining agreement. (R. 2-6, 37-38, 66). As a "wrongful discharge" is arguably within the ambit of the protections provided in Sections 7 or 8 of the Labor Management

Relations Act the Illinois courts were without jurisdiction to rule in this cause.

In *Viestenz* v. *Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir. 1982), *cert. denied,* 459 U. S. 972, the plaintiff brought an action for wrongful discharge and intentional infliction of emotional distress against his employer. *Id.* Both parties were subject to a collective bargaining agreement containing a mandatory grievance procedure. *Id.* at 701. The plaintiff failed to utilize that procedure. *Id.* The Tenth Circuit Court of Appeals reversed a damage award for the plaintiff and dismissed the case, reasoning that the wrongful discharge claim was arguably an unfair labor practice and, therefore, according to *Garmon,* was within the exclusive jurisdiction of the NLRB, "whether construed to sound in contract or in tort." *Id.* at 702. An identical result was reached in the more recent case of *Bell* v. *Union Carbide Corp.*, 582 F. Supp. 824 (E.D. Tenn. 1984). Therefore, based upon these well-founded principles of law it is clear that the case at bar, because it involved a claim for wrongful discharge, could only be adjudicated by the NLRB pursuant to this Court's decision in *Garmon.*

Another important distinction between *Allis-Chalmers* and the case at bar, in terms of the applicability of the *Garmon* rule, is that *Allis-Chalmers* was a controversy over insurance benefits whereas *Midgett* involved a claim for wrongful discharge. Disputes over issues concerning insurance benefits can arise under contexts other than employment relationships. A claim for wrongful discharge can only arise in an employment relationship. Therefore, based upon this Court's decision in *Farmer,* the Illinois Supreme Court was without jurisdiction to adjudicate *Midgett* because the Illinois tort of wrongful

discharge is related to allegations of employment discrimination. *Farmer,* 430 U.S. at 305.

The Illinois Supreme Court's decision in *Midgett* should be reversed because the Court lacked jurisdiction to adjudicate this action. The proper jurisdiction to decide this case belonged exclusively with the NLRB.

IV.

THIS CASE PRESENTS IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS.

The Illinois Court's holding carries with it far-reaching implications affecting the fundamental purposes of national labor policy. Collective bargaining agreements are essential to this policy. Nonetheless, under the reasoning of the Illinois Court, issues which go to the heart of contract administration may be separately litigated in state courts without reference to its grievance procedure for the final resolution of contract disputes.

The importance of the issue herein to the administration of labor policy is obvious. If Illinois is permitted to apply a retaliatory discharge tort to allegedly wrongful employee dismissals contrary to labor contract remedies, employers will be denied valuable bargained for consideration. Furthermore, other state courts may apply analogous tort theories with respect to a broad spectrum of other collective bargaining rights and obligations based on their own perceived interests, thereby creating a balkanized patchwork of labor law based on state jurisdictional boundaries. Following the analysis of the Illinois court, state public policy interests would be paramount, allowing the terms of the labor agreement to be ignored or overridden. By the simple expedient of

relabelling a contract violation as a common law tort, the Illinois Supreme Court articulated a rationale for the nullification of any labor agreement.

The Illinois decision frustrates significant national labor policy established in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965). Instead of uniformity in the application of federal law, the *Midgett* decision will promote a flood of possibly conflicting legal principles based on the concerns of local public policy. Rather than industrial peace and predictability, the central aim of collective bargaining supported by Congress and this Court, uncertainty will prevail as to how the contract terms of collective bargaining agreements should be administered under federal and state laws.

Finally, the Illinois Court's decision deprives the employer and the union of the fruits of their bargaining, contrary to the policies of the LMRA. The Illinois decision removes a basic element of stable labor relations by allowing an employee to ignore the terms of the collective bargaining agreement and bring an action independently of the contract. This result divests the contracting parties "of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel,* 379 U.S. at 653.

In conclusion, the Illinois Supreme Court's decision impermissibly and seriously intrudes on an area regulated by federal labor law and undermines important policies embodied therein. It substitutes state public policy concerns for the uniformity of federal law to be applied when labor contract rights are at issue. Equally important, it allows lawsuits to replace contractually established means of redress.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

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APPENDIX

Table of Contents

PAGE

A. Illinois Supreme Court Opinion filed October 19, 1984 ..... 1a

B. Illinois Appellate Court Decision filed September 21, 1983 ..... 13a

C. Illinois Circuit Court of Cook County Memorandum Opinions (Orders and Motions attached) dated September 1, 1981 and November 16, 1981 ..... 18a

D. Illinois Circuit Court of Cook County Order (Motion attached) dated March 13, 1981 ..... 31a

E. Illinois Supreme Court, Petition for Rehearing dated November 9, 1984 ..... 38a

F. Illinois Supreme Court Order and Amended Opinion dated February 1, 1985 ..... 44a

APPENDIX A

Filed: October 19, 1984

Juleann Hornyak, Clerk

Supreme Court, Springfield, Illinois

Docket Nos. 59341, 59350 cons.—Agenda 40—May 1984.

TERRY MIDGETT *et al.*, Appellees, v. SACKETT-CHICAGO, INC., *et al.*, Appellants.—JOSE ISABEL GONZALEZ, Appellant, v. PRESTRESS ENGINEERING CORPORATION, Appellee.

JUSTICE WARD delivered the opinion of the court:

These consolidated appeals concern the question of claimed retaliatory discharges of employees. The plaintiff in cause No. 59341, Terry Midgett, filed a complaint in the circuit court of Cook County alleging that he was unjustly discharged by his employer, Sackett-Chicago, in retaliation for his filing a claim with the Industrial Commission under the Workers' Compensation Act (the Act) (Ill. Rev. Stat. 1981, ch. 48, par. 138.1 *et seq*). Jose Gonzalez and John Repyak, plaintiffs in cause No. 59350, filed separate complaints in the circuit court of Livingston County alleging that their employer, Prestress Engineering, discharged them in retaliation for their filing workers' compensation claims under the Act. In all three cases the trial courts granted the employers' motions to dismiss the complaints for failure to state a cause of action. The appellate court in the fourth district consolidated the Gonzalez and Repyak appeals and in a Rule 23 order (87 Ill. 2d R. 23) affirmed the trial courts' dismissal of each complaint. (*Gonzales* v. *Prestress Engineering Corp.* (1983), 118 Ill. App. 3d 1167.) The appellate court in the first district, however, reversed the trial court in *Midgett*, holding that a cause of action was stated. (*Midgett* v. *Sackett-Chicago* (1983), 118 Ill. App. 3. 7.) We allowed a petition of Gonzales and Repyak

for leave to appeal from the fourth district judgment in *Gonzalez* (cause No. 59350) and allowed the petition of the defendant Sackett-Chicago for leave to appeal from the first district judgment in *Midgett* (cause No. 59341), under our Rule 315 (87 Ill. 2d R. 315). The appeals were consolidated for review.

In cause No. 59341 Terry Midgett, who was injured on January 31, 1979, in the course of his employment with Sackett-Chicago, filed a workers' compensation claim with the Industrial Commission. The claim was still pending when Midgett was discharged from his employment by Sackett in January 1980. Sackett reached a settlement of the claim with Midgett in August 1980. On December 31, 1980, Midgett, claiming a retaliatory discharge, filed an action in tort in his own name and on behalf of his wife and minor children, seeking compensatory and punitive damages against Sackett. Sackett moved to dismiss, stating that Midgett was a union member covered by a collective-bargaining agreement with specific grievance provisions for the arbitration of disputes, under which an arbitrator would determine if a discharge from employment was for "just cause." Sackett argued that Midgett, who had not filed a grievance, was limited to contract remedies under the agreement and had no cause of action in tort. Midgett filed cross-motions that in part alleged that the union and Sackett had prevented Midgett from filing a grievance for his discharge. The trial court dismissed Midgett's complaint.

In cause No. 59350 Gonzalez, in August 1981, filed a workers' compensation claim after suffering an injury while employed by Prestress Engineering. On August 23, 1982, an Industrial Commission arbitrator denied compensation on the ground that plaintiff's injury did not arise out of and in the course of his employment. Gonzalez was discharged on September 20, 1982, and he later filed his tort claim for retaliatory discharge against Prestress.

Plaintiff Repyak was also injured at defendant Prestress' plant and in July 1981 was awarded certain benefits under the Workers' Compensation Act. His employment by Prestress was terminated October 6, 1982, and he, too, filed a retaliatory-discharge action against Prestress. Repyak alleged in count II of his complaint that he and his wife, Elsie Repyak, were denied pension benefits because of his discharge approximately one year before his pension vested. Both employees were union members and were covered by a collective-bargaining agreement between the local and Prestress, with grievance procedures requiring "just cause" for an employee's discharge. Neither Gonzalez nor Repyak filed a grievance against the employer. The motions of Prestress to dismiss the complaints were granted.

The appellate court in the fourth district affirmed the Gonzalez and Repyak dismissals (118 Ill. App. 3d 1167), reasoning that, since the plaintiffs were union members protected by the collective-bargaining agreement and not employees at will, they would not bring a cause of action for retaliatory discharge as described in *Kelsay* v. *Motorola, Inc.* (1978), 74 Ill. 2d 172. Instead they were required to pursue and exhaust their grievance remedies under the agreement. The appellate court in the first district, in reversing the dismissal of Midgett's complaint (118 Ill. App. 3d 7), held that the tort of retaliatory discharge extended to union employees covered by such a collective-bargaining agreement in order to promote the strong public policy to favor protection of employees who exercise their rights under the Act, whether the employees are members of a union or not.

In *Kelsay* v. *Motorola, Inc.* (1978), 74 Ill. 2d 172, this court held there was a remedy in tort for employees who were discharged in retaliation for filing workers' compensation claims. Otherwise employers could coerce employees to forgo their rights under the Act by threatening to terminate, or by actually discharging, employees

who claimed compensation for industrial injuries. This remedy implements the public policy underlying the Act of providing employees an effective and equitable means to seek compensation for injuries sustained in the course of their employment without fear or risk of losing their jobs. In *Palmateer* v. *International Harvester Co.* (1981), 85 Ill. 2d 124, an employee was terminated for informing police of suspected criminal activities of his co-workers. In holding that the tort of retaliatory discharge was applicable we stated:

> "The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses.
>
> • • •
>
> All that is required [to bring a cause of action] is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." 85 Ill. 2d 124, 133-34.

The defendants here, however, argue that the action for retaliatory discharge was created to protect only "at-will" employees, such as those involved in *Kelsay* and *Palmateer*, who would otherwise be without a remedy for a vengeful discharge. The plaintiffs here are not "at-will" employees but are union members, protected by collective-bargaining agreements which provide specific grievance procedures to ensure discharge from employment only for "just cause." Since the plaintiffs here have a remedy through the union agreement, the defendants argue that the rationale in *Kelsay* is not involved and that the dismissal of plaintiffs' complaints was proper. The defendants cite other decisions of the appellate court that support their argument: *Mouser* v. *Granite City Steel Division of National Steel Corp.* (1984), 121 Ill. App. 3d 834; *Suddreth* v. *Caterpillar Tractor Co.* (1983), 114 Ill.

App. 3d 396; *Deatrick* v. *Funk Seeds International* (1982), 109 Ill. App. 3d 998; *Cook* v. *Caterpillar Tractor Co.* (1980), 85 Ill. App. 3d 402.

Emphasizing that the employees in *Kelsay* and *Palmateer* were at-will employees, they cite, too, *Lamb* v. *Briggs Manufacturing* (7th Cir. 1983), 700 F.2d 1092, which held that union employees under collective-bargaining agreements could not maintain an action for retaliatory discharge. We consider, however, that in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement. In *Kelsay,* an essential factor in providing the action for retaliatory discharge was a recognition of the importance of permitting the allowance of punitive damages against the offending employer. This court stated:

> "In the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim • • • The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this State • • • In the absence of other effective means of deterrence, punitive damages must be permitted • • •." (*Kelsay* v. *Motorola, Inc.* (1978), 74 Ill. 2d 172, 186-87.)

Applying this reasoning here, there is no reason to afford a tort remedy to at-will employees but to limit union members to contractual remedies under their collective-bargaining agreements. (*Wyatt* v. *Jewel Cos.* (1982), 108 Ill. App. 3d 840, 841-42.) Generally, if a union employee's grievance goes to arbitration and the arbitrator does not find just cause for the employee's discharge, the remedy will be simply job reinstatement

and full back pay. (See Silzer, *Workers' Compensation: Retaliatory Discharge of Employees Covered by a Collective Bargaining Agreement* (1981), 70 Ill. B.J. 164, 166.) If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against a violator of an important public policy of this State. It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee. The public policy against retaliatory discharges applies with equal force in both situations. (That Illinois has a strong public policy to insure the protection of workers covered by the Workers' Compensation Act is clear. Section 6 of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.6) requires employers to post printed notices containing information concerning the Act which is necessary to aid employees to safeguard their rights under the Act in the event of injury. Employers are required to file reports of injuries and other matters with the Commission, and the failure to do so constitutes a petty offense. Section 26 (Ill. Rev. Stat. 1981, ch. 48, par. 138.26) provides that in the event of any violation of the Act, which is declared to be a petty offense, the Attorney General and the State's Attorney of each county, upon the request of the Industrial Commission, shall enforce the penalties prescribed in the Act.)

The defendants argue that if union employees are allowed the tort action recognized in *Kelsay,* it would be violative of the Federal labor-law policy for industrial stability through the use of arbitration in union agreements. The argument is unconvincing. We cannot see any perceptible effect on the use of arbitration. There is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees. The appellate court observed in *Midgett*:

> "[T]he recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public policies, as opposed to purely private interests, are involved. Such an alternative is especially necessary and desirable in a case such as this where there has been an allegation of collusion between the union and the employer." *Midgett* v. *Sackett-Chicago, Inc.* (1983), 118 Ill. App. 3d 7, 9.

In light of defendants' argument regarding a Federal policy favoring arbitration, it is interesting to note that the Supreme Court has allowed employees, covered under a collective-bargaining agreement with an arbitration provision, to bring claims against employers that are founded upon violations of Federal statutory rights, such as violations of civil rights (*McDonald* v. *City of West Branch* (1984), ... U.S. ....., 80 L. Ed. 2d 302, 104 S. Ct. 1799), racial discrimination (*Alexander* v .*Gardner-Denver Co.* (1974), 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011), and violations of the Fair Labor Standards Act (*Barrentine* v. *Arkansas-Best Freight System, Inc.* (1981), 450 U.S. 782, 67 L. Ed. 2d 641, 101 S. Ct. 1437).

Sackett contends that Midgett's complaint was properly dismissed because he alleged no facts in his supporting affidavits, such as the exhaustion of grievance procedures, to sustain a cause of action. A plaintiff, however, need not plead the exhaustion of contract remedies to bring an action in tort. As was stated in *Palmateer,* the plaintiff must allege a retaliatory discharge and that the discharge violated a clear public policy. Midgett did this, and thus a cause of action was stated. Midgett, however, did not appeal the dismissal of his wife and children as plaintiffs. Those portions of the appellate and circuit court judgments dismissing them as party plaintiffs are, thus, to be left undisturbed.

John Repyak and his wife claim that, due to his discharge, they have an independent cause of action to re-

cover his pension rights which were lost upon his discharge, which occurred one year and four months before they would have vested. Their complaint, however, alleges that Repyak was discharged because he filed a workers' compensation claim and not because the employer wished to defeat his pension rights. The loss of pension rights would be a consequence of his discharge, and he may allege it as an element of damages in a retaliatory-discharge action against his employer.

Prestress, in cause No. 59350, filed a motion in this court to strike certain documents in Gonzalez' brief and the references to them, which motion was taken with the case. The documents in question were not made part of the record on appeal. Too, they were not before the trial court or the appellate court, and Prestress' motion to strike is allowed.

Midgett also filed a motion to strike portions of defendant Sackett's brief. This motion was also taken with the case. Midgett argues that those portions of the brief raise issues which were not raised in the trial court or in the appellate court and that Sackett has waived those issues for review here. After reviewing Sackett's briefs, we have determined that Sackett did not earlier raise the issue of Federal preemption. We therefore allow Midgett's motion to strike as to the portion of the brief discussing the issue.

For the reasons given, the judgment of the appellate court in cause No. 59341 is affirmed: the judgment of the appellate court and the judgments of the circuit court of Livingston County in cause No. 59350 are reversed and the causes are remanded to the circuit court for proceedings consistent with this opinion.

59341 — *Judgment affirmed.*

59350 — *Judgments reversed; cause remanded.*

JUSTICE MORAN, dissenting:

In *Kelsay* v. *Motorola, Inc.* (1978), 74 Ill. 2d 172, 181, this court found that an "employer's otherwise absolute power to terminate an employee at will should [not] prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmen's Compensation Act." In recognizing the tort of retaliatory discharge, the court created what was to be a narrow exception to the general rule that " at-will' employment is terminable at any time for any or no cause." (*Palmateer* v. *International Harvester Co.* (1981), 85 Ill. 2d 124, 128.) The court found this necessary to insure that at-will employees would be able to freely exercise their rights under the Workers' Compensation Act (Act) (Ill. Rev. Stat. 1981, ch. 48, par. 138.1 *et seq.*) without the risk of a retaliatory discharge by an employer against whom the employee had no recourse.

All of the plaintiffs in the consolidated cases here under review were covered by the collective-bargaining agreements containing grievance procedures for the determination of whether a discharge from employment was for just cause. Nevertheless, none of the plaintiffs utilized those procedures when pursuing their wrongful-discharge claims. All initially filed civil tort claims for retaliatory discharge against their employers. The majority opinion holds that an employee covered by a collective-bargaining agreement may bring "an action in tort, independent of any contract remedy." (Slip op. at 4.) In so doing, the court has turned the narrow exception of *Kelsay* into a general rule, applicable not only to at-will employees but also employees covered by a collective-bargaining agreement barring discharge of employees other than for just cause. As such, any employee, even if discharged for just cause, may now bring a civil action, sounding in tort, against his employer regardless of the fact that he voluntarily agreed to be bound by a collective-bargaining agreement providing procedures for handling the

grievances of discharged employees. Further, under the facts of the instant case, the employee may file his civil action without first exhausting, or even initiating, his contractual remedies pursuant to the grievance procedures set forth in the collective-bargaining agreement.

By extending the tort of retaliatory discharge in such a sweeping manner, today's opinion completely overlooks the specific policy consideration the court was confronted with when it recognized the tort of retaliatory discharge in *Kelsay.* In making the tort available to the at-will employee, the court, in *Kelsay,* provided a viable means for such employees to seek compensation under the Act without the threat that, in so doing, they would be sacrificing their job. The employee covered by a collective-bargaining agreement, requiring that just cause be shown in order to discharge a covered employee, is not faced with the same dilemma. As the appellate court noted in *Cook* v. *Caterpillar Tractor Co.* (1980), 85 Ill. App. 3d 402, 405-06, "the concept of retaliatory discharge is subsumed within the just-cause provision and is within the power of the arbitrator to consider when determining if a discharge is for just cause." Clearly, a finding that an employee has been discharged in retaliation for claiming rights guaranteed under the Act would rule out a finding of a discharge for just cause. Thus, an employee covered by such an agreement may apply for benefits under the Act knowing that a discharge in retaliation for exercising such statutory rights could be vindicated by following the arbitration procedures provided for in the collective-bargaining agreement.

The majority states that allowing union employees the benefit of the tort of retaliatory discharge will not have "any perceptible effect on the use of arbitration." (Slip op. at 5.) I cannot agree. As the appellate court in *Cook* correctly observed, "[t]o permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would deter-

mine the collective bargaining agreement." 85 Ill. App. 3d 402, 406.

In *Republic Steel Corp.* v. *Maddox* (1965), 379 U.S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614, the Supreme Court reached the same conclusion when considering a situation wherein an employee covered by a collective-bargaining agreement brought a civil action against his employer for severance pay, without pursuing the grievance procedures outlined in his collective-bargaining agreement. In finding that the employee was barred from suing his employer for severance pay because of his failure to follow the grievance procedures, the court stated:

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' [Citation]" 379 U.S. 650, 653, 13 L. Ed. 2d 580, 583-84, 85 S. Ct. 614, 616-17.

As the majority correctly observes, the *Kelsay* decision is significant in recognizing the importance of punitive damages as a deterrent to the offending employer. While I agree that an employer who unjustly discharges a union employee should not be immunized from punitive damages, I cannot agree that the expectations created by the collective-bargaining agreement should be entirely overlooked by allowing the union employee to completely circumvent the mutually agreed upon grievance procedures. Requiring union members to exhaust their contract remedies is part of the trade-off such employees accept in exchange for many rights that they benefit

from—rights not enjoyed by the employee at will. As such, union employees alleging retaliatory discharge should only be allowed to pursue a civil action in very limited situations. Specifically, the discharged union employee should be allowed to pursue the civil tort action, as recognized in *Kelsay,* when he has followed the appropriate grievance procedures and the arbitrator has made a finding of retaliatory motivation. On the other hand, if the arbitrator finds that the employee has been discharged for just cause, the employee should be precluded from pursuing a civil action, absent the existence of extraordinary circumstances such as collusion between the union and the employer. (*See Vaca* v. *Sipes* (1967), 386 U.S. 171, 185, 17 L. Ed. 842, 855, 87 S. Ct. 903, 914.) However, bare allegations of collusion, without alleging facts to support such conclusion, are not sufficient to transform an otherwise barred claim into an allowable civil action.

Plaintiff Midgett's claims of collusion were not included in his complaint. In its motion to dismiss Midgett's complaint, the defendant argued that the complaint failed to state a cause of action because Midgett did not pursue the administrative remedies he was bound to follow under the terms of the collective-bargaining agreement. In affidavits filed by Midgett, in support of his opposition to the motion to dismiss, he first alleged collusion and fraudulent misrepresentations by and between the union and the defendant employer. As such, he maintained that he was denied the opportunity to pursue his claim of retaliatory discharge through grievance procedures. These allegations, however, are merely conclusory statements, without supporting facts. Therefore, I find Midgett's claim of collusion insufficient to entitle him to institute a civil tort action against his employer.

For the reasons stated above, I respectfully dissent from the majority opinion.

RYAN, C.J., and UNDERWOOD, J., join in this dissent.

APPENDIX B

Third Division, Illinois
Appellate Court Decision
Dated September 21, 1983

81-3040

TERRY MIDGETT, MICHELINE MIDGETT, his wife, LISA LUCACCIONI, a minor, MICHELLE LUCACCIONI, a minor, TERRY MIDGETT, a minor and JOHN MIDGETT, a minor, by and through their next friend and kin, MICHELINE MIDGETT, their mother and guardian,

Plaintiffs-Appellants,

vs.

SACKETT-CHICAGO, INC. and DAVID J. SCHIMP, Individually and as Officer, Employee and Agent of SACKETT-CHICAGO, INC., and UNKNOWN DEFENDANTS,

Defendants-Appellees.

Appeal From The Circuit Court Of Cook County.
Honorable THOMAS J. O'BRIEN, *Judge Presiding.*

JUSTICE McGILLICUDDY delivered the opinion of the court:

Plaintiffs appeal from the dismissal with prejudice of their action in tort for retaliatory discharge for failure to state a cause of action against defendants, Sackett-Chicago, Inc., and David J. Schimp, et al. (Sackett).

On January 31, 1979, Terry Midgett (Midgett) suffered an injury in the course of his employment with Sackett. Alleging partial disability, Midgett filed a workers' compensation claim with the Illinois Industrial Commission

which was eventually settled. In January 1980, while the claim was pending, Midgett was discharged by Sackett. Midgett brought an action in tort in his own name and on behalf of his wife and minor children seeking damages for retaliatory discharge.

In the course of the pre-trial proceedings, Sackett filed two motions for involuntary dismissal. Sackett's accompanying affidavits alleged essentially that Midgett was a member of the Production Workers Union of Chicago and Vicinity, Local 707, during his employment with Sackett and at the time of his dicharge. Union members were protected by a collective bargaining agreement containing specific grievance procedures regarding discharge other than for "cause." Sackett maintained that Midgett was bound to pursue the administrative remedies provided by the collective bargaining agreement. Sackett moved to dismiss Midgett's claim sounding in tort for failure to state a cause of action. Midgett filed cross-motions in opposition to the motions to dismiss with affidavits generally denying Sackett's assertions and alleging that because the Union and Sackett were in collusion, the Union had not allowed him to file a grievance for his discharge. The trial court granted Sackett's motion to dismiss. The court stated that since it found that Midgett was a member of a union protected by a collective bargaining agreement and not an employee at will, he had no right to bring a cause of action for retaliatory discharge. Midgett appeals.

The primary issue before this court is whether an employee who is a union member and protected by a collective bargaining agreement has a cause of action in tort for retaliatory discharge.

A recent decision of this court, *Wyatt* v. *Jewel Companies, Inc.* (1982), 108 Ill. App. 3d 840, 439 N.E.2d 1053, *leave to appeal denied*, 92 Ill. 2d 573, addressed this issue. As in the case at bar, the plaintiff in that case

Wyatt, was a union member who brought suit against a former employer for retaliatory discharge, following the filing of a workers' compensation claim. The suit was dismissed for failure to state a cause of action. This court reversed the decision of the trial court, holding that a union member, such as Wyatt, was entitled to sue in tort for retaliatory discharge regardless of the existence of contractual remedies pursuant to a collective bargaining agreement. In reaching that decision this court emphasized the important public policy embodied in the Illinois Workers' Compensation Act and the need to protect the workers who invoke that policy, citing *Kelsay* v. *Motorola* (1978), 74 Ill. 2d 172, 384 N.E.2d 353.

In *Kelsay,* the Illinois Supreme Court recognized a cause of action for retaliatory discharge of an employee at will who filed a workers' compensation claim. The court held that the cause of action arose separately from any action for breach of contract. Additionally, the court held that punitive damages might be awarded for such a discharge occurring after December 1978. This decision was based upon the strong public policy favoring the protection of rights stemming from the Workers' Compensation Act. (Ill. Rev. Stat. 1979, ch. 48, par. 138.1 *et seq.*) In *Wyatt* v. *Jewel Companies, Inc.,* this court stated that to allow a cause of action for retaliatory discharge to an employee at will while denying it to a union member, would lead to an absurd result since punitive damages would be available to an employee at will, but would not be available to an employee protected by a union contract, despite the fact that union contracts are specifically designed to protect against discharge other than for cause.

We reject defendants' contention that such a determination tends to undermine the federal labor law policy favoring the arbitration of labor disputes covered by a collective bargaining agreement, as expressed in *United Steelworkers of America* v. *Warrior & Gulf Navigation*

Co. (1960), 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409. On the contrary, the recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public policies, as opposed to purely private interests, are involved. Such an alternative is especially necessary and desirable in a case such as this where there has been an allegation of collusion between the union and the employer. See *Deatrick* v. *Funk Seeds International* (1982), 109 Ill. App. 3d 998, 441 N.E.2d 669.

Defendants rely upon a third district decision, *Cook* v. *Caterpillar Tractor Co.* (1980), 85 Ill. App. 3d 402, 407 N.E.2d 95, where the court held that *Kelsay* was not applicable to an employee protected by a collective bargaining agreement, and that such an employee was limited to remedies provided by the union contract, and was required to exhaust such remedies. However, we first point out that plaintiff in the case at bar has alleged collusion between the union and his former employer, effectively precluding his pursuit of administrative remedies, thus in our opinion this case is distinguishable from *Cook*. Further, we cannot agree with the result reached by the court in *Cook* because we believe it was inconsistent with the decision of our supreme court in *Palmateer* v. *International Harvester Co.* (1981), 85 Ill. 2d 124, 421 N.E.2d 876, which expanded the availability of a cause of action in tort for retaliatory discharge where strong public policies are involved.

In *Palmateer*, an employee at will filed a claim for retaliatory discharge after he supplied law enforcement officials with information that an International Harvester employee might be violating the law. The trial court dismissed the complaint for failure to state a cause of action and the appellate court affirmed in a divided opinion. Our supreme court granted leave to appeal to "determine the contours of the tort of retaliatory discharge approved in *Kelsay* v. *Motorola, Inc.* (1978), 74 Ill. 2d 172." (85 Ill. 2d 124, 127.) The court held that public policy favored

Palmateer's action in reporting illegal activities, and that to state a cause of action for retaliatory discharge "[a]ll that is required is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." (85 Ill. 2d 124, 134.) Thus, the court reversed the decisions of the appellate court and the trial court, and held that Palmateer had stated a cause of action in tort for retaliatory discharge.

In the case at bar, Midgett has alleged that he was fired by Sackett for filing a workers' compensation claim, which, if true, contravenes a clearly mandated public policy as defined in *Kelsay* v. *Motorola*. Thus, under the rule established in *Palmateer*, we believe Midgett has stated a cause of action in tort.

Defendants assert that regardless of Midgett's rights, his wife and children have no cause of action against Sackett. We agree with this contention. Therefore, it is ordered that Midgett's wife and children are dismissed as plaintiffs in this cause.

Reversed and remanded for proceedings consistent with this opinion.

McNAMARA, P.J., and RIZZI, J., concur.

APPENDIX C

Filed September 1, 1981

Morgan M. Finley, Clerk

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT - LAW DIVISION

80 L 30776

MIDGETT

v.

SACKETT

Plaintiff files cause of action for Retaliatory Discharge and defendant raises by way of Section 48 Motion the affirmative defense under Section 48(i) that plaintiff's employment is subject to collective bargaining agreement (Alexander Afdvt of 4/9/81) therefore under neither *Kelsay* v. *Motorola* nor *Palmateer* v. *IH* is a cause of action recognized.

I

To the extent that plaintiffs counter-affidavit denies allegations in Deft's *Motion* (as opposed to its supportive affidavits) such will be ignored since the court would not consider the allegations in the Movants Motion as to facts outside the record in any event.

Further, bald denials of ones opponents affidavit w/o stating facts sufficient enough to create a question of fact, do not comply w/ SCR 191 *PEFFERLE* v. *PRAIRIE*, 72 Il Ap 2 440. Further, statements in affidavits which are mere conclusions or seek to offer hearsay testimony, do not comply w/ SCR 191 and will be stricken. *SCHULTZ* v. *AMER NAT BK*, 40 IL AP 3 800. Accordingly

pars 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23 & 24 of plaintiff's affidavit are stricken. Par 7 is a mere denial w/no factual basis in support of creating an issue of fact over the authenticity of the Collective Bargaining Agreement and therefore is stricken. Pars 14 & 15 are conclionry in form and are stricken.

II

Therefore no question of fact exists as to the plaintiff's status under the collective bargaining agreement which affiant movant states covered plaintiff's employment and therefore plaintiff being *NOT* an employee at will, the rationale of *Kelsay* & *Palmateer* do not apply & Illinois recognizes *no cause* of action for retalitory discharge.

III

Not necessary for this decision the court nevertheless holds that even if the allegations in pars 14, 15 & 16 were properly alleged such would not create a cause of action for retalitory discharge while other actions in the nature of breach of contract may be possible against these & other parties—none is alleged in the Complaint. Complaint Dismissed.

/s/ Thos. J. O'Brien

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MIDGETT,

Plaintiff

v.

SACKETT CHICAGO,

Defendant

NO. 80 L 30776

ORDER

THIS CAUSE COMING ON TO BE HEARD on motion of the Defendant pursuant to Section 48(i) of the Illinois Civil Practice Act, questions raised having been fully argued and briefed and the court fully advised;

IT IS HEREBY ORDERED, pursuant to this court's MEMORANDUM OPINION that Defendant's motion be and hereby is granted;

IT IS HEREBY FURTHER ORDERED that plaintiff's affidavit is stricken and the court finding no questions of fact raised hereby DISMISSES plaintiff's Complaint with prejudice.

IT IS HEREBY FURTHER ORDERED that the court finds no just reason to delay enforcement of or appeal from this order.

September 1, 1981

ENTER:

/s/ Thos. J. O'Brien
Judge

T.L. Barnich (McDermott, Will & Emery)
Attorney for Defendant
111 W. Monroe
Chicago
372-2000

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
LAW DIVISION

TERRY MIDGETT, MICHAELINE MIDGETT, his wife, LISA MIDGETT, a minor, MICHAEL MIDGETT, a minor, TERRY MIDGETT, a minor and JOHN MIDGETT, a minor, by and through their next friend and kin, MICHAELINE MIDGETT, their mother and guardian,

Plaintiffs,

vs.

SACKETT-CHICAGO, INC., and DAVID J. SCHIMP, individually and as Officer, Employee and Agent of SACKETT-CHICAGO, INC., and UNKNOWN DEFENDANTS,

Defendants.

No. 80-L-30776

MOTION TO DISMISS

NOW COMES, Defendant, Sackett-Chicago Company, incorrectly sued herein as Sackett-Chicago, Inc., by its attorneys, Thompson & Mitchell, and respectfully prays to the Court, pursuant to Chapter 110, §48 of the Illinois Civil Practice Act, to enter an order dismissing the Plaintiffs' Complaint with prejudice on the basis of the attached Affidavits and accompanying Exhibits, and in support thereof, states as follows:

* * *

8. Terry Midgett was a member of Local 707 and was subject to, and bound by, the provisions of the Collective Bargaining Agreement entered into on his behalf by Local 707 with the Defendant Sackett-Chicago Company. The plaintiffs' allegations of wrongful discharge are covered by the "just cause" provisions of this Agreement. Terry Midgett must first pursue the grievance

procedures and remedies available to him under the Collective Bargaining Agreement since his rights are grounded in that contract. The Plaintiffs' Complaint fails to state a cause of action because of Terry Midgett's failure to pursue and exhaust the contractual procedures and remedies which are available to him.

9. The United States Supreme Court has expressly stated that:

> [i]f the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend upon the ground that the exclusive remedies provided by such a contract have not been exhausted. *Since the employer's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.* For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967) (emphasis added).

These remarks are equally applicable to the present case. Absent any agreement, it is clear that an employer may discharge an employee for any reason whatsoever not otherwise prohibited by law. In the present case, however, Sackett-Chicago Company has contractually agreed with Local 707, acting on behalf of Terry Midgett, to limit its virtually unfettered right to discharge an employee. Under the terms of that Agreement, the Defendant Sackett-Chicago Company can only discharge an employee for "just cause."

The Plaintiffs in this case are seeking to recover for the Defendant's alleged wrongful discharge of the Plaintiff Terry Midgett. These allegations can clearly only be based upon the "just cause" provision of the Collective

Bargaining Agreement. Just as in *Vaca* v. *Sipes, supra,* the Plaintiff Terry Midgett is bound by the terms of the collective bargaining agreement which govern the manner in which contractual rights, such as the one in question in the case at bar, may be enforced. Accordingly, Plaintiff Terry Midgett must first pursue and exhaust those bargained-for procedures and available contractual remedies before Plaintiffs can bring suit to enforce those contractual rights.

10. In *Cook* v. *Caterpillar Tractor Co.*, 407 N.W.2d 95 (3d Dist. 1980), the plaintiff brought suit against his employer claiming that he had been wrongfully discharged for pursuing his right to receive compensation under the Illinois Workmen's Compensation Act. At the time of the discharge, the plaintiff was subject to the terms of the collective bargaining agreement which prohibited the employer from discharging an employee without "just cause" and contained a grievance and arbitration procedure.

In affirming the Trial Court's dismissal of the Plaintiff's Complaint, the Court held that the plaintiff was bound by the Collective Bargaining Agreement between his Union and the Employer and that the question of retaliatory discharge was "subsumed within the just cause provision" of the contract. *Id* at 98. According to the Court:

> It is true that the Agreement does not specifically enumerate retaliatory discharge as a grievance. However, not every conceivable problem can be covered by a Collective Bargaining Agreement. Such an Agreement is an effort to erect a system of industrial self-government. *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* (1960) 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409. Because of the breadth of matters covered by such an Agreement, as well as a need for a fairly concise and readable instrument, the Agreement cannot specifically enu-

> merate a provision to cover every situation. Therefore, the provision regarding the employer's right to discharge for just cause and the employee's right to continuance of his employment in the absence of such just cause, are couched in general and ambiguous terms. *Payne* v. *Pullman Company*, (1957) 13 Ill. App.2d 105, 141 N.E.2d 83. These terms are given practical implementation by the establishment of a complete system of arbitration. In view of the above, it is clear that simply because retaliatory discharge is not specifically mentioned in the Collective Bargaining Agreement, it is not beyond the scope of the Agreement. *Id.*

Since the plaintiff had "failed to raise the issue of retaliatory discharge as an issue in the grievance procedure, "the Court found that the plaintiff had failed to exhaust his contractual remedies. As a result, the Court ruled that the plaintiff's failure to exhaust his contractual remedies barred him from filing suit for retaliatory discharge.

The Court rejected the plaintiff's argument that his suit for retaliatory discharge was a tort rather than a breach of contract action under the Illinois Supreme Court's decision in *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), which held that an employee who is terminable at will can sue in tort for retaliatory discharge. According to the Court:

The Court went on to state:

> In addition, there is another compelling reason not to extend the tort of retaliatory discharge. To permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would undermine the collective bargaining agreement. Grievance procedures, including arbitration, were set up to prevent industrial strife. *See United Steelworkers of America* v. *Warrior*

> *& Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed2d 1409. To permit these procedures to be circumvented in a situation where the employee is protected by the procedures is to invite strife unnecessarily. *The employee has a remedy in contract and to expand the tort of retaliatory discharge to include the instant situation is not only unnecessary, but counter-productive as well. Therefore, we believe the employee must exhaust all the remedies available to him before filing suit which, of course, sounds in contract. See Payne* v. *Pullman, supra. Id.* at 98-99 (emphasis added).

Similarly, in *Meeks* v. *South Bend Freight Lines, Inc.*, 407 N.E.2d 228 (3d Dist. 1980), an employee sued his employer to collect vacation pay allegedly owed to him. This plaintiff was also covered by a collective bargaining agreement which provided for grievance procedures for settling disputes arising under the contract. Instead of first pursuing the grievance procedures set out in the contract, the plaintiff filed suit against his employer.

The Trial Court interpreted the Collective Bargaining Agreement to mean that the plaintiff's only remedies were the grievance procedures contained in the Agreement and could not bring an action at law because those procedures were not followed. The Appellate Court upheld the Trial Court, holding that the Trial Court had correctly interpreted the Collective Bargaining Agreement to mean that the plaintiff's only remedies were the grievance procedures contained in the agreement. The Court stated in its opinion:

> The Courts have consistently held that where, as in the present case, a Collective Bargaining Agreement establishes a grievance and arbitration procedure, the agreement must be construed to establish these procedures as the *exclusive* [emphasis added] mode of redress for the enforcement of the terms of the

employment contract unless the parties, through the agreement, expressly agree otherwise. (*Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed. 2d 580 (1964); *Orphan* v. *Furnco Construction Corporation,* 466 F. 2d 795 (7th Cir., 1972); *Payne* v. *Pullman Company,* 13 Ill.App.2d 105, 141 N.E.2d 83 (1st Dist., 1957)) . . . *Furthermore, it is well settled law that an employee seeking to enforce the employment contract must at least attempt to exhaust his contractual remedies before resorting to a judicial remedy.* (*Matzer* v. *Florsheim Shoe Co.,* (1st Dist. 1971), 132 Ill.App.2d 470, 270 N.E.2d 75, *Payne* v. *Pullman Co.* (1st Dist. 1957, 13 Ill.App.2d 105, 141 N.E.2d 83). *Id.* at 231.

WHEREFORE, Defendant, Sackett-Chicago Company respectfully prays of the Court the entry of an Order dismissing the Plaintiffs' Complaint with prejudice.

THOMPSON & MITCHELL

BY: /s/ ALLEN D. ALLRED
Allen D. Allred
327 Missouri Avenue, Suite 402
East St. Louis, Illinois 62201
618/271-0166
Attorneys for Sackett-Chicago Company

CERTIFICATE OF SERVICE

The undersigned hereby, certifies that a copy of the foregoing was mailed, postage prepaid, to Nicholas T. Kitsos, Attorney for Plaintiffs, at 100 West Monroe Street, Suite 900, Chicago, Illinois, 60603, on the 9th day of April, 1981.

/s/ MARY A. TOMLIN

Filed November 16, 1981
Morgan M. Finley, Clerk

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

80 L 30776

MIDGETT

-vs-

SACKETT

This is the third time this issue has visited the bench. While the court has no aversion to reconsidering any prior ruling; reaching a decision on this issue has been made needlessly difficult by the undisciplined fashion of plaintiff's counsel in raising issues in an untimely fashion; arguing the existence of issues that are not part of the record nor even alleged in the Complaint, and cavalierly filing pleadings different than those ordered sometimes in a late fashion.

Regardless of how the Complaint is characterized outside its four corners, suffice it to say it alleges no facts upon which a cause of action could be stated in the name of the wife and children of plaintiff and does not allege the employment status of plaintiff, so when met w/ a Motion under Sec. 48(i) raising "affirmative matter" such as a collective bargaining agreement covering plaintiffs terms of employment, it must be dismissed as not coming w/in *Kelsay* or *Palmatter*—unless a question of fact exists over the existence of the agreement. A mere disagreement over its terms is insufficient to defeat a Sec. 48 Motion—since it is for the court to determine what the agreement says—unless the agreement is ambiguous requiring extrinsic evidence for construction.

I

The court is aware of cases that hold mere denials ot allegations of the Complaint even if support by undenied affidavits are not proper under Sec. 48, the court must accept the well pleaded facts as true. *First Nat. Bk. of Oak Lawn v. Minke* 99 Ill. App. 3 10.

The difficulty here is there are no facts in the Complaint setting forth plaintiffs employment status and for the reasons previously stated in the ruling of 9/1/81 the plaintiffs status under the collective bargaining agreement is not competently denied.

Motion to vacate order of 9/1/81 denied.

Since the tendered Amended Complaint is filed in the names of parties plaintiff that have already been determined have no cause of action—leave to file same is denied.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

Terry Midgett et al.

Plaintiffs,

v.

Sackett-Chicago, Inc., et al.

defendants.

NO. 80 L 30776

ORDER

THIS CAUSE COMING ON MOTIONS By the plaintiff to vacate this court's order of September 1, 1981 and for leave to file their Amended Complaint, due notice having been given, the parties heard and the court fully advised;

IT IS HEREBY ORDERED, pursuant to the finding of this court's MEMORANDUM OPINION, that no cause of action could be stated in the name of the wife and children of plaintiff, and that plaintiff does not allege his employment status, that plaintiffs' Motion be DENIED.

IT IS HEREBY FURTHER ORDERED that this court's order of September 1, 1981, dismissing plaintiff's cause of action with prejudice is not vacated and remains standing in effect; and

IT IS HEREBY FURTHER ORDERED that plaintiff is denied leave to file an Amended Complaint in the name of his wife and children;

IT IS HEREBY FURTHER ORDERED that the court finds no just reason to delay enforcement of or appeal from this order.

November 16, 1981

ENTER:

/s/ THOMAS J. O'BRIEN
Judge

Name T. L. BARNICH (McDermott, Will & Emery)
Attorney for Defendants
Address 111 W. Monroe
City Chicago
Telephone 372-2000

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

TERRY MIDGETT, MICHELINE MIDGETT, His Wife, LISA LUCACCIONI, a minor, MICHELLE LUCACCIONI, a minor, TERRY MIDGETT, a minor and JOHN MIDGETT, a minor, by and through their next friend and kin, MICHELINE MIDGETT, their mother and guardian,

Plaintiffs,

-vs-

SACKETT-CHICAGO, INC., and DAVID J. SCHIMP, Individually and as Officer, Employee and Agent of SACKETT-CHICAGO, INC., and UNKNOWN DEFENDANTS.

Defendants.

NO. 80 L 30776

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT.

Now comes Plaintiffs, TERRY MIDGETT, et al., by NICHOLAS T. KITSOS, their attorney, and respectfully move this Honorable Court for Leave to File the Amended Complaint in the above cause attached hereto and made a part hereof pursuant to law so provided and in support states as follows:

1. The Amended Complaint tendered with this Motion and referred to therein is in accordance with the facts hereto set forth before the Court, the Oral Argument and Pronouncement of counsel during said argument as an alternative cause of action made out by the matters of record in this case and is not otherwise barred or prohibited by law.

WHEREFORE, Plaintiffs ask leave to file instanter the Amended Complaint attached hereto and made a part hereof and to reconfirm the filing thereof but plaintiffs in no way waive their right to file said Amended Complaint nor represent that leave is necessary and present this motion with said reservation and because the matter is unclear in the pronouncement of this court.

Respectfully

TERRY MIDGETT, et al.,
Plaintiffs

BY: .....
NICHOLAS T. KITSOS
THEIR ATTORNEY

APPENDIX D

Filed March 13, 1981
Morgan M. Finley, Clerk

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

Midgett et al

v.

Sackett-Chicago, Inc, et al

NO. 80 L 30776

ORDER

This Matter coming on to be heard on motion of defendant to dismiss with prejudice, due notice given, and parties having been heard and the court fully advised as to the premises;

It is hereby ordered that said motion as presently constituted, is denied and defendant is given 28 days to file a section 48 motion and affidavits in support of said motion with leave to plaintiff to respond thereto within 28 thereafter.

ENTER:
March 13, 1981
/s/ THOMAS J. O'BRIEN
Judge

Name A.D. Allred
Attorney for Defendant
Address 327 Missouri Avenue
City East St. Louis, Ill.
Telephone 618-271-0166

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 80-L-30776

TERRY MIDGETT, MICHAELINE MIDGETT, his wife, LISA MIDGETT, a minor, MICHAEL MIDGETT, a minor, TERRY MIDGETT, a minor, and JOHN MIDGETT, a minor, by and through their next friend and kin, MICHAELINE MIDGETT, their mother and guardian,

Plaintiffs,

vs.

SACKETT-CHICAGO, INC., and DAVID J. SCHIMP, individually and as Officer, Employee and Agent of SACKETT-CHICAGO, INC., and UNKNOWN DEFENDANTS,

Defendants.

MOTION TO DISMISS

Now comes the Defendant, Sackett-Chicago, Inc., by its attorneys, Thompson & Mitchell, and respectfully prays to the Court the entry of an Order dismissing the Plaintiffs' Complaint with prejudice, and in support thereof, states as follows:

* * *

4. The Plaintiff's Complaint at Law fails to plead that Terry Midgett has complied with said Contract and grievance procedure by which he was bound and thus the Plaintiff has failed to pursue the administrative remedies available to him which he agreed to pursue under the terms of the Collective Bargaining Agreement. Thus, the Plaintiff's Complaint, on its face, fails to state a cause of action against the Defendant.

5. The Illinois Courts have addressed this question directly. In *Cook* v. *Caterpillar Tractor Company,* 407 N.E.2d 95 (3rd Dist., 1980), the Plaintiff brought a civil

action against his employer claiming that he had been wrongfully discharged. The Appellate Court upheld the Trial Court's dismissal of the Plaintiff's Complaint and in so ruling held that:

> "It is true that the Agreement does not specifically enumerate retaliatory discharge as a grievance. However, not every conceivable problem can be covered by a Collective Bargaining Agreement. Such an Agreement in an effort to erect a system of industrial self-government. *United Steelworkers of America* v. *Warrior & Gulf Navigation Company* (1960) 363 U.S. 574, Federal L.Ed.2d 1409, 80 Supreme Court 1347. Because of the breath of matters covered by such an Agreement, as well as a need for fairly concise and readable instrument, the Agreement cannot specifically enumerate a provision to cover every situation. Therefore, the provision regarding the employer's right to discharge for just cause and the employee's right to continuance of his employment in the absence of such just cause, are couched in general and ambiguous terms. *Payne* v. *Pullman Company,* 13 Ill.App.2d 105, 141 N.E.2d 83 (1957). These terms are given practical implementation by the establishment of a complete system of arbitration. In view of the above, it is clear that simply because retaliatory discharge is not specifically mentioned in the Collective Bargaining Agreement, it is not beyond the scope of the Agreement.:

The Court in *Cook* held that the Plaintiff was bound by the Collective Bargaining Agreement between his Union and the Employer. This contract or agreement was entered into for the purposes of protecting the employee so as not to make his employment terminable at will. The Court went on to hold:

> "[I]n addition, there is another compelling reason not to extend the tort of retaliatory discharge. To permit an employee to circumvent procedures mutu-

ally agreed upon for handling grievances by filing suit in the first instance, would undermind the Collective Bargaining Agreement. Grievance procedures, including arbitration, were set up to prevent industrial strife. *See, United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 4 L.Ed.2d 1409, 30 S.Ct. 1347 (1960). To permit these procedures to be circumvented in a situation where the employee is protected by the procedures, is to invite strife unnecessarily. The employee has a remedy in contract and to expand the tort of retaliatory discharge to include the instant situation is not only unnecessarily but counter-productive as well. Therefore, we believe the employee must exhaust all the remedies available to him before filing suit which, of course, sounds in contract.

In the very recent decision of *Meeks* v. *South Bend Freight Lines, Inc.*, 407 N.E.2d 228 (3rd Dist., 1980), an employee of the defendant brought suit to collect vacation pay allegedly due him from the defendant employer. The plaintiff was covered under a Collective Bargaining Agreement which provided for grievance procedures that the aggrieved employee would implement in the event of a dispute with his employer. The Trial Court interpreted the Collective Bargaining Agreement to mean that the plaintiff's only remedies were the grievance procedures contained in the agreement and could not bring an action at law because those procedures were not followed. The Appellate Court upheld the Trial Court holding that the Trial Court had correctly interpreted the Collective Bargaining Agreement to mean that the plaintiff's only remedies were the grievance procedures contained in the agreemnt. The Court stated in its opinion that:

"The Courts have consistently held that where, as in the present case, a Collective Bargaining Agreement establishes a grievance and arbitration procedure, the agreement must be construed to establish

these procedures as the *exclusive* [emphasis added] mode of redress for the enforcement of the terms of the employment contract unless the parties, through the agreement, expressly agree otherwise." (*Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1964); *Orphan* v. *Furnco Construction Corporation,* 466 F.2d 795 (7th Cir., 1972); *Payne* v. *Pullman Company,* 13 Ill. App.2d 105, 141 N.E.2d 83 (1st Dist., 1957)).

It is clear from the face of the Collective Bargaining Agreement between the Plaintiff and the Defendant in the instant case, that the parties agreed that the grievance and arbitration procedure would be implemented in the event of a dispute.

6. That the United States Supreme Court in *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1343 (1960), stated:

"The Collective Bargaining Agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a Court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of Collective Bargaining Agreements, we think special heed should be given to the context in which Collective Bargaining Agreements are negotiated and the purpose which they are intended to serve."

The Court was very clear in its holding that the parties to a Collective Bargaining Agreement are bound by that agreement/contract and must use the provisions within that agreement to resolve grievances rather than seeking recourse in the Courts. The Court went on to state:

"The Courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining wheth-

er there is particular language in the written instrument which will support the claim. *The agreement is to submit all grievances to arbitration* [emphasis added], not merely those which the Court will deem meritorious."

WHEREFORE, Defendant, Sackett-Chicago Company, respectfully prays of the Court the entry of an Order dismissing the Plaintiff's Complaint with prejudice.

THOMPSON & MITCHELL

By /s/ ALLEN D. ALLRED
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327 Missouri Avenue, Suite 420
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Attorneys for Sackett-Chicago Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, to Nicholas T. Kitsos, Attorney for Plaintiffs, at 100 West Monroe Street, Suite 900, Chicago, Illinois 60603, on the 9 day of February, 1981.

/s/ CAROLE McBRIDE

APPENDIX E

Filed November 9, 1984
Juleann Hornyak, Clerk

NO. 59341

IN THE
SUPREME COURT OF ILLINOIS

TERRY MIDGETT, *et al.*,

Plaintiff-Appellee,

v

SACKETT-CHICAGO, INC., *et al.*,

Defendant-Appellant.

Appeal from the Appellate Court of Illinois,
First District, Third Division
NO. 81-3040
There Heard on Appeal from the Circuit Court
of Cook County, County Department,
Law Division
NO. 80 L 30776
Honorable Thomas J. O'Brien, Judge Presiding.

PETITION FOR REHEARING

NOW COMES the Defendant-Appellant, SACKETT-CHICAGO, INC., by and through its attorneys, BENJAMIN P. HYINK and LAWRENCE M. LIEBMAN of the LAW OFFICES OF DRUGAS, MAIONE, MORGAN & HYINK, and in support of its petition for rehearing, states as follows:

On October 19, 1984 this Honorable Court rendered its opinion in the above-entitled cause. By that opinion, this Court ruled four to three, that the tort of retaliatory dis-

charge may be maintained by employees covered by a collective bargaining agreement prohibiting their discharge for other than just cause. Further, this Court ruled that such employees need not exhaust grievance procedures contained within the agreements prior to bringing a tort action for retaliatory discharge in the circuit court. Finally, this Court struck that portion of the Defendant-Appellant, SACKETT-CHICAGO, INC.'s, (hereinafter referred to as "SACKETT") brief relating to the issue of federal preemption.

For the reasons that follow this court's decision was in error and misconstrued SACKETT's arguments regarding federal preemption.

Section IIB of SACKETT's brief in this court discussed the issue of federal preemption of the Plaintiff-Appellee, TERRY MIDGETT's (hereinafter referred to as "MIDGETT") cause of action. This argument went to the basis of the trial court's subject matter jurisdiction and thus could not have been waived in this court. This issue was specifically addressed by the United States Court of Appeals in *Olguin* v. *Inspiration Consolidated Copper Co.,* 740 F. 2d 1468 (9th Cir. 1984).

In *Olguin,* the plaintiff brought a four count complaint in state court sounding in breach of contract, wrongful discharge, wrongful discharge in violation of public policy and intentional infliction of emotional distress. In affirming the dismissal of the plaintiff's complaint the court stated that. "[e]ven if the wrongful discharge is based on state tort law, it is preempted." *Olguin,* 740 F.2d at 1474.

Further, in *Jackson* v. *Consolidated Rail Corporation,* 717 F.2d 1045 (7th Cir. 1983), the Seventh Circuit Court of Appeals ruled that under the Railway Labor Act, exclusive jurisdiction of a wrongful discharge action arising under Indiana tort law lies in the National Railroad Adjustment Board. This conclusion was buttressed by the same analytical route that a case under the National Labor

Relations Act would be decided under. *Jackson,* 717 F.2d at 1053.

As pointed out in SACKETT's main brief in this court, the United States Supreme Court refused to draw a distinction between the Railway Labor Act and the National Labor Relations Act in terms of utilization of available grievance procedures. *Republic Steel Corp.* v. *Maddox* (1965), 379 U.S. at 655-656, 13 L.Ed.2d at 585, 85 S.Ct. at 618. (SACKETT's brief, p. 27) There being no distinction between the two Acts as it applies to wrongful discharge suits, the *Jackson* analysis as to subject matter jurisdiction is applicable here.

Further, this Court cited three United States Supreme Court cases for the proposition that federal policy favoring arbitration of disputes under a collective bargaining agreement is not absolute. This Court's reliance thereon is misplaced.

In *Alexander* v. *Gardner-Denver Company* (1974), 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011, a black employee filed a grievance under his collective bargaining agreement eventually alleging wrongful discharge on account of race. The grievance went to arbitration where it was ruled that the plaintiff's discharge was for just cause. Meanwhile, during the pendency of the arbitration hearing, plaintiff filed a complaint with the Colorado Civil Rights Commission. That claim was referred to the Equal Employment Opportunity Commission which ruled that there was no violation of the federal Civil Rights Act of 1964. The plaintiff then brought suit pursuant to 42 U.S. C.S. sec. 200e-5(f)(1).

The District Court and the Court of Appeals held that the plaintiff was bound by the arbitration decision rendered during the grievance proceeding. The Supreme Court reversed. The Court relied on the fact that the Civil Rights Act of 1964 gave the plaintiff "a statutory right independent of the arbitration process." *Alexander,* 415 U.S. at 54, 39 L.Ed.2d at 161.

The case of *Barrentine* v. *Arkansas-Best Freight System* (1981), 450 U.S. 728, 67 L.Ed.2d 641, 101 S.Ct. 1437, dealt with employees under a collective bargaining agreement who were not compensated by the employer for time spent complying with safety inspections of trucks before driving them. Pursuant to the terms of the collective bargaining agreement grievances were filed and the claims went to arbitration, which were resolved in favor of the employer.

The employees then filed an action under the Fair Labor Standards Act (FLSA), 29 U.S.C. sec. 216(b). The District Court refused to address the FLSA claim on the grounds that submission of the issue to arbitration barred the employees from asserting the FLSA action in federal court. The Supreme Court reversed on the ground that the FLSA gave the employees a distinct cause of action without referral to exhaustion requirements. *Barrentine,* 450 U.S. at 740, 101 S.Ct. at 1444.

In *McDonald* v. *City of West Branch,* ..... U.S. ....., 80 L.Ed.2d 302, 104 S.Ct. 1799, the plaintiff brought a grievance under his collective bargaining agreement alleging wrongful discharge. The grievance went to arbitration and was resolved in favor of the employer. The plaintiff then filed suit pursuant to 42 U.S.C. sec. 1983, alleging that his discharge was based on his exercise of his First Amendment right of freedom of speech. The Court of Appeals reversed a verdict in plaintiff's favor on the ground that the arbitrator's decision had preclusive effect on a subsequent lawsuit. The Supreme Court reversed on the ground that 42 U.S.C. sec. 1983 created a separate cause of action. *McDonald,* 80 L.Ed.2d at 308.

This Court's reliance on the three aforesaid cases is misplaced. In each of these cases the plaintiffs first utilized and exhausted available grievance procedures; here, the plaintiff did not. (Slip op., p. 2) More importantly, in each of the above-cited cases, the plaintiffs proceeded under federal statutes specifically granting them rights

to proceed in federal court for federal causes of action. As the *Jackson* court pointed out, the rationale of *Barrentine* and similar cases does not apply to wrongful discharge claims based on state causes of action. *Jackson*, 717 F.2d at 1051. It is clear that the United States Congress has the power and authority to create exceptions to federal labor policy. Conversely, it is equally clear that this Court has no such power.

The opinion rendered in this cause will have far-reaching effects beyond the concerns of the parties presently before the court for two reasons. The ultimate effect of this Court's October 19, 1984 opinion will be to invalidate previously negotiated and agreed upon grievance and arbitration provisions from every collective bargaining agreement in the State of Illinois. Employers who do business in Illinois will no longer be able to negotiate with confidence as to the enforceability of grievance and arbitration provisions. While the general trend over the past fifty years of American legal history has been toward the development to alternatives to expensive courtroom litigation, such as, arbitration proceedings, this opinion, unless reversed, will set the clock back fifty years and encourage more litigation.

This opinion will have a chilling effect on business activity in Illinois. Certainly employers will prefer to do business where they can rely upon the enforceability of their lawful agreements. With this opinion Illinois employers can reasonably expect to be faced with large numbers of frivolous, unsupported, nuisance suits, like the one in the Sackett case. Not only will employers have to count the loses after the discharge of an employee for just cause, but now they will have to weigh the lesser of two evils — pay to settle a nuisance suit of an unworthy former employee or pay even more to attorneys, court reporters and file clerks to defend the case on the merits.

In its opinion, this Court clearly expressed its desire to deter violation of Illinois public policies by employers.

However, the present framework of grievance and arbitration procedures can accomplish the result now sought by this Court. Punitive damages can be provided for in collective bargaining agreements for wrongful dismissals in contravention of Illinois public policy. The dramatic change in labor-management relations which this opinion will cause will not only be unnecessary to deter public policy violations by employers, but it will also injure the employees the Court hopes to protect by diminishing available employment opportunities in Illinois. For if Illinois becomes the only state to deny employers and employees the right to enter binding agreements with respect to employment grievance procedures, Illinois business development will probably suffer needlessly.

CONCLUSION

For the reasons set forth above the defendant-appellant, SACKETT-CHICAGO, INC., prays that this Honorable Court reconsider the opinion heretofore rendered in this cause, reverse the Illinois Appellate Court, First District and affirm the judgment of the circuit court of Cook County.

Respectfully submitted,

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BENJAMIN P. HYINK

.....
LAWRENCE M. LIEBMAN

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APPENDIX F

Filed February 1, 1985
Juleann Hornyak, Clerk

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
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February 1, 1985

Mr. Benjamin P. Hyink
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Chicago, IL 60602

Nos. 59341 — Terry Midgett, et al., etc., appellees, v.
59350 Sackett-Chicago, Inc., et al., etc., appellants.
Cons. Appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for rehearing in the above entitled cause. Miller, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on February 8, 1985.

Attached please find new pages to the opinion.

59341 Midgett v. Sackett-Chicago, Inc.

a strong public policy to insure the protection of workers covered by the Workers' Compensation Act is clear. Section 6 of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.6) requires employers to post printed notices containing information concerning the Act which is necessary to aid employees to safeguard their rights under the Act in the event of injury. Employers are required to file reports of injuries and other matters with the Commission, and the failure to do so constitutes a petty offense. Section

26 (Ill. Rev. Stat. 1981, ch. 48, par. 138-26) provides that in the event of any violation of the Act, which is declared to be a petty offense, the Attorney General and the State's Attorney of each county, upon the request of the Industrial Commission, shall enforce the penalties prescribed in the Act.)

The defendants argue that if union employees are allowed the tort action recognized in *Kelsay,* it would be violative of the Federal labor-law policy for industrial stability through the use of arbitration in union agreements. The argument is unconvincing. We cannot see any perceptible effect on the use of arbitration. There is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees. The appellate court observed in *Midgett*:

> "[T]he recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public policies, as opposed to purely private interests, are involved. Such an alternative is especially necessary and desirable in a case such as this where there has been an allegation of collusion between the union and the employer." *Midgett* v. *Sackett-Chicago, Inc.* (1983), 118 Ill. App. 3d 7, 9.

In light of defendants' argument regarding a Federal policy favoring arbitration, it is interesting to note that the Supreme Court has allowed employees, covered under a collective-bargaining agreement with an arbitration provision, to bring claims against employers that are founded upon violations of Federal statutory rights, such as violations of civil rights (*McDonald* v. *City of West Branch* (1984), —— U.S. ——, 80 L. Ed. 2d 302, 104 S. Ct. 1799), racial discrimination (*Alexander* v. *Gardner-Denver Co.* (1974), 415 U.S. 36, 39 L.Ed. 2d 147, 94 S. Ct. 1011), and violations of the Fair Labor Standards Act (*Barrentine* v. *Arkansas-Best Freight System, Inc.* (1981), 450 U.S. 782, 67 L. Ed. 2d 641, 101 S. Ct. 1437).

Paragraph inserted

Sackett contends that Midgett's complaint was properly a strong public policy to insure the protection of workers covered by the Workers' Compensation Act is clear. Section 6 of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.6) requires employers to post printed notices containing information concerning the Act which is necessary to aid employees to safeguard their rights under the Act in the event of injury. Employers are required to file reports of injuries and other matters with the Commission, and the failure to do so constitutes a petty offense. Section 26 (Ill. Rev. Stat. 1981, ch. 48, par. 138.26) provides that in the event of any violation of the Act, which is declared to be a petty offense, the Attorney General and the State's Attorney of each county, upon the request of the Industrial Commission, shall enforce the penalties prescribed in the Act.)

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provision, to bring claims against employers that are founded upon violations of Federal statutory rights, such as violations of civil rights (*McDonald* v. *City of West Branch* (1984), —— U.S. ——, 80 L. Ed. 2d 302, 104 S. Ct. 1799), racial discrimination (*Alexander* v. *Gardner-Denver Co.* (1974), 415 U.S. 36, 39 L.Ed. 2d 147, 94 S. Ct. 1011), and violations of the Fair Labor Standards Act (*Barrentine* v. *Arkansas-Best Freight System, Inc.* (1981), 450 U.S. 782, 67 L. Ed. 2d 641, 101 S. Ct. 1437).

Our conclusion that employees like the ones here are not limited to contractual remedies available under collective-bargaining agreements has been reached in other jurisdictions. See *Purchert* v. *Agsalud* (1984), —— Hawaii ——, 677 P.2d 449; *Peabody Galion* v. *Dollar* (10th Cir. 1981), 666 F.2d 1309; *Carnation Co.* v. *Borner* (Tex. 1980), 610 S.W.2d 450; *Vaughn* v. *Pacific Northwest Bell Telephone Co.* (1980), 289 Or. 73, 85-89, 611 P.2d 281, 287-90; *Judson Steel Corp.* v. *Workers Compensation Appeals Board* (1978), 22 Cal. 3d 658, 596 P.2d 564, 150 Cal. Rptr. 250.

Sackett contends that Midgett's complaint was properly dismissed because he alleged no facts in his supporting affidavits, such as the exhaustion of grievance procedures, to sustain a cause of action. A plaintiff, however, need not plead the exhaustion of contract remedies to bring an action in tort. As was stated in *Palmateer,* the plaintiff must allege a retaliatory discharge and that the discharge violated a clear public policy. Midgett did this, and thus a cause of action was stated. Midgett, however, did not appeal the dismissal of his wife and children as plaintiffs. Those portions of the appellate and circuit court judgment dismissing them as party plaintiffs are, thus, to be left undisturbed.

John Repyak and his wife claim that, due to his discharge, they have an independent cause of action to recover his pension rights which were lost upon his discharge, which occurred one year and four months before they would have vested. Their complaint, however, al-

leges that Repyak was discharged because he filed a workers' compensation claim and not because the employer wished to defeat his pension rights. The loss of pension rights would be a consequence of his discharge, and he may allege it as an element of damages in a retaliatory-discharge action against his employer.

Prestress, in cause No. 59350, filed a motion in this court to strike certain documents in Gonzalez' brief and the references to them, which motion was taken with the case. The documents in question were not made part of the record on appeal. Too, they were not before the trial court or the appellate court, and Prestress' motion to strike is allowed.

Midgett also filed a motion to strike portions of defendant Sackett's brief. This motion was also taken with the case. Midgett argues that those portions of the brief raise issues which were not raised in the trial court or in the appellate court and that Sackett has waived those issues for review here. After reviewing Sackett's briefs, we have determined that Sackett did not earlier raise the issue of Federal preemption. We therefore allow Midgett's motion to strike as to the portion of the brief discussing this issue.

For the reasons given, the judgment of the appellate court in cause No. 59341 is affirmed; the judgment of the appellate court and the judgments of the circuit court of Livingston County in cause No. 59350 are reversed and the causes are remanded to the circuit court for proceedings consistent with this opinion.

59341 — Judgment affirmed.
59350 — Judgment reversed; cause remanded.